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Attorneys for Plaintiff CATHERINE GELLIS
and all others similarly situated

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CATHERINE GELLIS, individually and on behalf) Case No. C 07-03679 JSW
of all others similarly situated,)

Plaintiff,)

v.)

VERIZON COMMUNICATIONS, INC., a)
Delaware corporation; VERIZON WIRELESS, an)
unincorporated association; CELLCO)
PARTNERSHIP, an unincorporated association;)
and DOES 1-100, inclusive,)

Defendants.)

**JOINT CASE MANAGEMENT
STATEMENT**

Date: February 1, 2008
Time: 1:30 p.m.

1 1. Jurisdiction and Service. Subject matter jurisdiction is proper under 28 U.S.C.
2 § 1332(d) (the Class Action Fairness Act (CAFA)). No issues regarding jurisdiction or service
3 are known or foreseen.

4 2. Facts. This is a class action. Plaintiff Catherine Gellis is a California consumer
5 customer of Cellco Partnership d/b/a Verizon Wireless (“VZW”) who paid a \$5 minimum late
6 fee pursuant to a provision of her agreement that purports to allow VZW to charge the greater of
7 \$5 or 1.5% a month as a fee for late payments. She seeks to represent a class of California
8 consumers who paid such late fees.

9 Plaintiff contends this late fee provision is a liquidated damages provision that is void
10 because it violates California Civil Code section 1671(d) because it is neither “impracticable”
11 nor “extremely difficult” to ascertain the actual damage VZW suffers as the result of such
12 late payments, and because the amount of the late fee does not reflect any “reasonable
13 endeavor” by VZW to estimate the actual damages caused by such late payments. VZW
14 moved to dismiss all claims on the ground that the late payment charge is a “rate” within
15 the meaning of the Federal Communications Act and that plaintiff’s state law claims are
16 preempted by the Act, and the Court denied the motion on November 5, 2007. VZW now
17 contends that the late payment provision satisfies the requirements of California law.

18 The principle factual disputes are expected to involve the correct scope and measure
19 of VZW’s actual damages incurred as a result of such late payments, whether such damages
20 are impractical to determine at the outset of the contract, and the extent to which the subject
21 late fee provision is or is not based on a reasonable effort by VZW to estimate the same.

22 3. Legal Issues. Without prejudice to either party’s position, the parties
23 provide the following summary of the key legal points:

24 Under section 1671, liquidated damage clauses in consumer contracts are presumed
25 void, placing the burden on the proponent of the clause to rebut that presumption. *Garrett v.*
26 *Coast & Southern Fed. Sav. & Loan Assn.*, 9 Cal.3d 731, 738 (1973). It is for the Court (not
27 the jury) to decide the question of the “validity” of the liquidated damages clause based on
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1 whether it was impracticable or extremely difficult for defendant to fix the actual damages
 2 and whether defendant made a reasonable endeavor to estimate a fair average compensation
 3 for its loss. *Beasley v. Wells Fargo Bank*, 235 Cal.App.3d 1383, 1393 (1991). Plaintiff
 4 contends that the Court decides the “validity” question primarily as a matter of fact (not
 5 law). *Ibid*.

6 Plaintiff contends the late fee provision is an unlawful penalty which is void pursuant
 7 to Civil Code section 1671(d). She also contends that the inclusion of such an unlawful
 8 provision in thousands of consumer contracts is an unlawful business practice which
 9 violates the Unfair Competition Law (UCL), Business & Professions Code section 17200,
 10 and the Consumer Legal Remedies Act, Civil Code section 1750 et seq. Pursuant to those
 11 authorities, plaintiff seeks declaratory and injunctive relief, restitution of VZW's ill-gotten
 12 gains, and damages according to proof. If successful on her claims, plaintiff will be entitled
 13 to recover her attorneys' fees, costs and expenses of suit pursuant to Civil Code section
 14 1780(d) and/or Code of Civil Procedure section 1021.5.

15 VZW contends that “impracticability” under section 1671(d) is determined as of the
 16 time of contracting, not at the time of the breach or trial. *Better Foods Mkts. v. American*
 17 *Dist. Teleg. Co.*, 40 Cal.2d 179 (1953). VZW contends that the “reasonable endeavor”
 18 prong focuses on whether the liquidated damage amount bears a reasonable relationship to a
 19 fair estimate of the actual damages from the breach of the contract. *Utility Consumer's*
 20 *Action Network v. AT&T Broadband of Southern Cal.*, 135 Cal.App.4th 1023, 1038 (2006)
 21 (“UCAN”). VZW contends that the actual process used to determine the liquidated damage
 22 amount is not material as long as the amount set is reasonable. Plaintiff contends that
 23 VZW's motivation behind inserting the liquidated damages provision into the form contract
 24 is an important, if not overwhelming, factor in “reasonable endeavor” analysis. *Hitz v. First*
 25 *Interstate Bank*, 38 Cal.App.4th 274, 289 (1995); see *UCAN*, 1038 FN9.

26 VZW contends that, if the liquidated damages clause is found to be void under
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1 section 1671, then the late paying customer “remains liable for the actual damages resulting
2 from” the late payment as an offset to any damages recoverable from defendant as a result
3 of this finding. *Garrett*, 741; *Beasley*, 1390. Defendant may assert this amount as an
4 affirmative defense and/or crossclaim. The parties disagree as to whether the amount of the
5 actual damage setoff, if any, is an issue triable by a jury. Plaintiff contends that the
6 existence and amount of any setoff is a jury question. *Beasley*, 1393. VZW contends that
7 Plaintiff’s position is based on a misreading of *Beasley*.

8 4. Motions. On November 5, 2007, this Court has denied defendants’ motion to
9 dismiss on Federal preemption grounds (the Federal Communication Act (47 U.S.C. §
10 332(c)(3)(A))). No motions are pending at this time. Plaintiff will bring a motion for class
11 certification pursuant to the scheduling order, after which defendants anticipate bringing
12 dispositive motions pursuant to the scheduling order. VZW may also bring motion(s)
13 concerning the individual claims of the named plaintiff after conducting discovery relating to
14 her individual claim. Other than potential discovery motions, no further motions are anticipated
15 at this time

16 5. Amendment of Pleadings. No amendments to the pleadings are pending or
17 anticipated at this time

18 6. Evidence Preservation. Plaintiff does not have any significant evidence
19 preservation issues, and is maintaining her VZW records. VZW submits that it will comply
20 with its obligation under the law to preserve evidence in its possession or control. Plaintiff
21 requests that the Court direct VZW to make more specific representations with regard to the
22 steps taken “to preserve evidence relevant to the issues reasonably evident in this action,
23 including interdiction of any document-destruction program and any ongoing erasures of e-
24 mails, voice mails, and other electronically recorded material.” See U.S. Northern District
25 of California Standing Order re Contents of Joint Case Management Statement.

26 7. Disclosures. The parties exchanged Initial Disclosures on or about
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1 December 10, 2007 per agreement following the order on the preemption motion. Plaintiff
2 disclosed and produced, among other things, her VZW records. Defendant disclosed, among
3 other things, the names of certain persons most knowledgeable and produced a Cost Study
4 which it contends supports its late fee practices.

5 8. Discovery. Following Initial Disclosures, plaintiff submitted discovery
6 requests for documents and information relating primarily to the costs and revenues
7 associated with defendant's late fee practices in California. Pursuant to an extension,
8 defendant's responses are due January 30, 2008. Depending on the responses, plaintiff
9 anticipates requiring at least one additional set of follow-up written discovery, potentially
10 followed by 2-4 depositions, prior to bringing a motion for class certification.

11 9. Class Actions. The motion for class certification will be sharply contested on
12 the "predominance" issue at least. Plaintiff contends that the "validity" issue predominates:
13 the liquidated damages clause is common to all class members, and the presumption of
14 invalidity can be rebutted, if at all, on a classwide basis. VZW contends that differences
15 between individual late-payers, including application of VZW's likely affirmative defenses
16 to putative class members, prevent a finding that common facts predominate and/or create
17 intra-class conflicts that preclude class certification. The parties agree that some class
18 certification-related issues may also bear on the merits and that there will be some overlap
19 for discovery purposes.
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21 The parties propose to defer setting a hearing on class certification for an additional
22 90-120 days in order to allow discovery to progress further and, thus, facilitate discussion
23 on streamlining the issues and assessment of an appropriate briefing.

24 10. Related Cases. The parties are not aware of related cases.

25 11. Relief. Plaintiff seeks restitution of late fees imposed on California consumer
26 customers less setoffs (as applicable) and an injunction against VZW collecting such late
27 fees in the future. The amounts involved are not presently known to plaintiff, but are
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1 readily calculable after discovery. By removing to Federal court pursuant to CAFA,
2 defendant indicated that the amount at stake exceeds \$5 million. VZW anticipates that the
3 precise amount of the \$5 minimum late fees collected may be difficult to ascertain, at least
4 on an individual customer basis.

5 12. Settlement and ADR. The parties have stipulated to private mediation, at
6 JAMS, to occur prior to the hearing on class certification, with a mediator to be agreed on
7 by March 1, 2008.

8 13. Consent to Magistrate Judge. VZW has objected to the initial assignment to
9 Magistrate Judge Brazil.

10 14. Other References. None.

11 15. Narrowing of Issues. Defendant does not contest the “numerosity” issue with
12 respect to class action. The parties are committed to working on narrowing the disputed
13 issues where possible.

14 16. Expedited Schedule. The parties do not believe the case is the type that can
15 be handled on an expedited basis.

16 17. Scheduling. The parties request that entry of the scheduling order be delayed
17 an additional 90 to 120 days. See ¶9 above.

18 18. Trial. Plaintiff has requested a jury trial, and plaintiff anticipates about 5 days
19 of evidentiary hearing for trial. VZW has not requested a jury trial, and contends that
20 plaintiff has no right to a jury trial in this case.

21 19. Disclosure of Non-party Interested Entities or Persons. On July 17, 2007,
22 VZW filed its disclosure and certificate of interested entities and persons.

23 20. Other Matters.

24 a. Protective Order. A stipulated protective order was entered on or
25 about November 29, 2007.

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1 Dated: January 25, 2008

CHAVEZ & GERTLER LLP
BRAYTON PURCELL LLP

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3 By: Nance F. Becker
4 Nance F. Becker
5 Attorneys for Plaintiff

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7 Dated: January 25, 2008

MUNGER TOLLES & OLSON LLP

8 /s/
9 By: _____
10 Hojoon Hwang
11 Attorneys for Defendants
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